

NO. 83-889

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CLERK

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**In the Supreme Court of the United States**

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October Term, 1983

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BUNNAN TONG & COMPANY, LTD.,  
*Defendant-Petitioner,*

*vs.*

F.W. WOOLWORTH COMPANY and  
TRAVELERS INSURANCE COMPANY,  
*Defendants-Respondents,*  
  
*and*

TELINA NELSON, a minor, by Cindra R. Carson,  
Guardian ad Litem, GERALD NELSON, and  
SHERRY NELSON,  
  
*Plaintiffs-Respondents.*

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On Petition For a Writ Of Certiorari To The  
United States Court of Appeals  
For The Seventh Circuit

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**BRIEF OF RESPONDENTS IN OPPOSITION TO  
PETITION FOR CERTIORARI**

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Travelers Insurance Company

### **QUESTION PRESENTED FOR REVIEW**

Where a Hong Kong distributor has indirectly but knowingly served the entire United States market with its products, does an exercise of personal jurisdiction over that distributor in a state where one of those products caused injury violate the due process clause of the Fourteenth Amendment to the United States Constitution?

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**CONSTITUTIONAL PROVISION INVOLVED****AMENDMENT XIV (Ratified July 9, 1868)**

**SECTION I.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

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**BRIEF OF RESPONDENTS IN OPPOSITION TO  
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**STATEMENT OF CASE**

Since the end of World War II, Bunnan Tong & Company, Ltd. (hereinafter Bunnan Tong) has been a broker and importer of men's shirts in Hong Kong for the F.W. Woolworth Company<sup>1</sup> (hereinafter Woolworth). From that time until the present, Bunnan Tong engaged and

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<sup>1</sup> The F.W. Woolworth Company has no parent company, no subsidiaries other than wholly-owned subsidiaries and no affiliates.

continues to engage in extensive business dealings with Woolworth. (A 18).

On June 6, 1966, Woolworth and Bunnan Tong entered into a series of buying agreements under which Bunnan Tong agreed that all merchandise purchased for Woolworth would be inspected by Bunnan Tong to ensure that it met the requirements of all United States government laws and regulations. Bunnan Tong also agreed to hold Woolworth harmless with regard to any claim made against Woolworth by anyone involving their merchandise. These buying agreements, and particularly the hold harmless clause and guarantee that their products would meet U.S. laws and regulations, remained essentially unchanged during the entire course of the business relationship between Bunnan Tong and Woolworth. (A 2-3).

In 1967, Charles W. Turner, an employee of Woolworth for 42 years, assumed the position as buyer of men's shirts for Woolworth. In that position he began personal dealings with the directors of Bunnan Tong, Nia Yan Chan and T. K. Tong. These dealings took him to Hong Kong on an annual basis and, in turn, the directors of Bunnan Tong made periodic trips to the corporate offices of Woolworth in New York City. At all times during the years that Charles W. Turner dealt with them, both Nia Yan Chan and T. K. Tong were fully aware of the nature and extent of Woolworth's retailing operation and that the men's shirts Woolworth purchased through Bunnan Tong were retailed in the ordinary course of trade throughout the United States. (A 18-19).

On October 28, 1976, pursuant to a buying agreement between Bunnan Tong and Woolworth, an order was placed for 4,300 dozen boy's 100% cotton flannel shirts. This order and a confirmation order were directed from



Woolworth's New York, New York office to Bunnan Tong & Company, Ltd., 1441 Prince's Building, Hong Kong. Each document contained the following:

**CONDITIONS:** In accepting this order shipper or seller agrees to indemnify save harmless and defend F.W. Woolworth Co. against any claim or action involving this merchandise or arising out of its sale or possession by F.W. Woolworth Co. and against any loss damage or expense incurred by F.W. Woolworth Co. in connection therewith.

These flannel shirts were to be packaged at the factory with Woolworth's "Topsall" label for Woolworth and shipped by April 1, 1977. The flannel shirts were subsequently manufactured by the United Garment Manufacturing Company, Ltd., of Hong Kong (A 17), and shipped by Woolworth to ports located in New York, Philadelphia, San Francisco and Los Angeles. (A 14).

During the months preceding Christmas of 1977, the plaintiff's mother, Sherry Nelson, was shopping for Christmas gifts in a F.W. Woolworth store in Rice Lake, Wisconsin. Gerald Nelson and Sherry Nelson are residents of the State of Wisconsin and are the natural parents of the minor plaintiff, Telina Nelson. Mrs. Nelson noticed a display while in Woolworth that contained a number of boy's cotton printed flannel shirts bearing the label "Topsall". Mrs. Nelson was attracted to the flannel shirts and purchased two, one for her daughter Telina, then four years old, and one for her other daughter, Staci. (A 7-12).

One of the shirts purchased by Mrs. Nelson was given to Telina for Christmas in 1977. Telina continued to wear the shirt as needed until October 28, 1978, when while in the process of wearing said shirt, she came into contact



with an open flame from a Park Industries, Inc. butane cigarette lighter. This caused the "Topsall" cotton flannel shirt to ignite inflicting horrific and permanent injuries.

On September 14, 1981, by her guardian ad litem, Telina Nelson filed a diversity action against Woolworth, The Travelers Insurance Company<sup>2</sup> and the manufacturer of the butane lighter, Park Industries, Inc. Her Complaint was amended on June 2, 1982 adding Bunnan Tong & Company, Ltd. and United Garment Manufacturing Company, Ltd. as defendants.

On September 16, 1982, however, the District Court entered an Order dismissing Bunnan Tong for lack of personal jurisdiction. This Order was reversed by the United States Court of Appeals for the Seventh Circuit on September 16, 1983, and Bunnan Tong has petitioned the Supreme Court of the United States to issue a writ of certiorari to review the judgment of the Seventh Circuit.

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<sup>2</sup> The Travelers Insurance Company is an insurer of Woolworth. It is a wholly-owned subsidiary of The Travelers Corporation. The Travelers Insurance Company has no subsidiaries or affiliates of its own. The Travelers Corporation, however, has the following wholly-owned subsidiaries which may be considered affiliates to The Travelers Insurance Company: The Charter Oak Fire Company; Constitution Plaza, Inc.; Derby Advertising, Inc.; Keystone Custodian Funds, Inc.; The Massachusetts Companies, Inc.; The Phoenix Insurance Company; The Plaza Corporation; The Prospect Company; Travelers Equities Sales, Inc.; The Travelers Indemnity Company of America; The Travelers Indemnity Company; The Travelers Indemnity Company of Illinois; The Travelers Indemnity Company of Rhode Island; The Travelers Insurance Company of Illinois; The Travelers Investment Management Company; The Travelers Life and Annuity Company; The Travelers Life Insurance Company and The Travelers Marine Corporation.

## SUMMARY OF ARGUMENT

The Petitioner has failed to show that a conflict exists within the meaning of Supreme Court Rule 17.1(a). Those cases cited either do not employ a stream-of-commerce analysis or merely exemplify a rejection of its use under certain facts by courts that otherwise have approved the doctrine.

The Petitioner also seeks to show that this case involves important questions of federal law which have not been but should be decided by the Court. Each proposed question, however, either has been settled by the Court or is not material to a determination of whether Bunnan Tong is amenable to suit in Wisconsin.

## ARGUMENT

The first issue before the Court involves whether a federal court of appeals determination that the Petitioner is amenable to suit in Wisconsin, even though the Petitioner has no direct contact with this state, is in conflict with a decision of another federal court of appeals on the same matter. Woolworth contends that it does not conflict.

The United States Court of Appeals for the Seventh Circuit determined that the stream-of-commerce doctrine was controlling and based its reversal of the District Court on a review of the following undisputed facts:

- (1) That the Petitioner introduced 51,600 men's flannel shirts into a stream of commerce that led to a market consisting of all 50 states of the United States;
- (2) When so doing, the Petitioner was knowledgeable of the extent of the market for which these shirts were intended and fully expected them to reach this market;

(3) The Petitioner derived a substantial economic benefit from the introduction of the product into Woolworth's nation-wide market; and

(4) The product which allegedly caused injury, along with several others, arrived in Wisconsin for no other reason but nation-wide marketing of which the Petitioner was aware and from which they derived substantial economic benefits.

The Petitioner contends that the opinion of the Seventh Circuit conflicts with opinions from the Third, Fifth and Ninth United States Courts of Appeals. In support of this contention, they cite *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981), *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175 (9th Cir. 1980), *cert. denied*, 449 U.S. 1062 (1980), *Insurance Company of North America v. Marina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981) and, *Talbot Tractor Company, Inc. v. Hinomoto Tractor Sales, USA*, 703 F.2d 143 (5th Cir. 1983).

Not one of the cases cited by the Petitioner is related either by facts or through application of law to the Seventh Circuit's decision in the instant case. *DeJames* did not "recognize that a defendant . . . manufacturing ships . . . was not subject to personal jurisdiction in a state where those ships could regularly be expected to dock." (Petitioner's Brief at 3). In *DeJames*, the opinion of the United States Court of Appeals for the Third Circuit pointed out that the plaintiff could direct the court's attention only to one contact that Hitachi had with the State of New Jersey, i.e., the vessel on which Hitachi had done conversion work was docked in Camden, New Jersey when the plaintiff sustained his injury. *DeJames*, 654 F.2d at 284.

The Third Circuit correctly characterized the plaintiff's reliance on numerous cases applying the stream-of-commerce doctrine as the basis for jurisdiction over Hitachi as "misplaced". *DeJames*, 654 F.2d at 285. Hitachi did not use a distributive or marketing scheme whereby they sought to have the vessel marketed and sold through channels to a New Jersey resident. It was significant that Hitachi did not seek to receive an economic benefit, either directly or indirectly, from the docking of the vessel in New Jersey. 654 F.2d at 285. It is interesting that the court cited with approval those cases which utilized the stream-of-commerce rationale contrasting them with the facts of *DeJames*. It is even more interesting that the precise requirements which the court found absent are prominently undisputed with regard to Bunnan Tong's conduct in the instant case.

The Petitioner's reliance on *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175 (9th Cir. 1980) cert. denied, 449 U.S. 1062 (1980), is equally misplaced. In *Kramer*, the United States Court of Appeals for the Ninth Circuit did not affirm, reject nor even discuss the stream-of-commerce doctrine with regard to its impact on personal jurisdiction. In fact, there was no product alleged to have caused injury and the case was analyzed in terms of whether the defendant's activities were systematic and continuous, not in terms of the rationale applied by the Seventh Circuit.

Bunnan Tong has also cited *Insurance Company of North America v. Marina Salina Cruz*, 649 F.2d 1266 (9th Cir. 1981), and claims that this case along with *Kramer* demonstrates a conflict with the Seventh Circuit's opinion on the same matter. Clearly, in *Insurance Company of North America* the Marina Salina Cruz, although aware that the ship on which they were work-

ing would be used by its owners in Alaskan waters, never intended to serve the Alaskan market. As in *DeJames*, a wholly inappropriate attempted utilization of the stream-of-commerce doctrine to sustain jurisdiction was properly rejected.

A final case cited by Bunnan Tong in support of its contention is that of *Talbot Tractor Company, Inc. v. Himomoto Tractor Sales, USA, Inc.*, 703 F.2d 143 (5th Cir. 1983). Here the United States Court of Appeals for the Fifth Circuit did provide a brief analysis of the facts under the stream-of-commerce doctrine but found the doctrine inapplicable because of the absence of a demonstrable financial benefit realized by Kane-matsu-Gosho (U.S.A.), Inc. The same is not true with regard to Bunnan Tong as seen in the method by which they were compensated and the quantity and nature of merchandise they purchased for shipment.

The Petitioner has cited four isolated decisions by three United States Circuit Courts of Appeals claiming that the stream-of-commerce analysis found in the Seventh Circuit's opinion is in conflict with those cases on the same issue. However, if any rule can be taken from the Third Circuit's opinion in *DeJames* it is one approving use of the stream-of-commerce doctrine to sustain jurisdiction under facts such as those constituting the record in the instant case. In view of the Ninth Circuit opinions in *Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969) and *Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155 (9th Cir. 1980), the former rendered prior to *Kramer* and the latter one month afterward, Bunnan Tong's argument that the Ninth Circuit is in conflict with the Seventh Circuit cannot be justified. Both *Duple Motor Bodies* and *Plant Food Co-op* specifically discussed and approved the doc-

trine where defendants did not have contact with the forum nor control of the delivery network, but where each expected the product to reach the market through a known stream-of-commerce and each derived economic benefit from the introduction of the product into that stream.

Likewise, while Bunnan Tong contends that *Talbot Tractor Company* is a rejection of the stream-of-commerce doctrine, the same court in *Oswalt v. Scripto, Inc.*, 616 F.2d 161 (5th Cir. 1980) specifically analyzed and approved its use under facts identical in all significant respects to those underlying the opinion of the Seventh Circuit. The Petitioner has failed to cite one federal appellate court case which conflicts with the ruling below. For this reason, Petitioner's application for the issuance of a writ of certiorari under Supreme Court Rule 17.1(a) must fail.

\* \* \*

As a second basis for its request that a writ of certiorari issue, Bunnan Tong has proposed three questions which they claim are of such importance that the immediate attention of the United States Supreme Court is required. They claim that these questions have not been but should be settled by the Court so that foreign manufacturers and distributors can structure their business relationships appropriately to limit jurisdictionally significant contacts to a predictable number of forums.

It is also suggested that the Court must speak to whether due process protections extend equally to citizens and non-citizens alike and whether existing due process considerations should apply in the same manner to those entities that control a distribution network as those who do not.



Woolworth concedes that if the structure of business relations by foreign manufacturers and distributors were jurisdictionally significant, one could predict with certainty where those manufacturers and distributors could or could not be forced into court to defend lawsuits arising from injuries caused by their products. The formal structuring of business relationships, however, is not and should not be the test. The defendant's conduct must be examined. As stated:

The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co. v. Washington*, 326 U.S., at 319, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

*World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. at 297, 62 L.Ed. 2d 490, 501, 100 S.Ct. 559 (1980). The element of predictability is derived from the structure of the defendant's conduct and not from the manner in which they structure their business relationships. This was formulated in *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), discussed and followed in *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961), later discussed in *Oswalt*, and then in *World-Wide Volkswagen Corp.* It is not an issue that is in need of settling by the Court. In the instant case, Bunnan Tong knowingly structured their conduct to serve a market indirectly that included every state in the United States. Under existing and settled law they must answer in those forums which comprise the market. *Oswalt*, 616 F.2d at 199, 200.

The question regarding whether due process considerations extend to citizens and non-citizens alike was ad-



dressed indirectly (albeit in the equal protection context) in the recent case of *Plyler v. Doe*, 457 U.S. 202, 72 L.Ed. 2d 786, 102 S.Ct. 2382 (1982) where the court held to the understanding that "the protection of the Fourteenth Amendment extends to anyone, citizen or stranger . . ." 457 U.S. at 215. This holding was cited by the Supreme Court of Texas in *Hall v. Helicopteros Nacionales De Colombia, S.A. ("Helicol")*, Tex., 638 S.W.2d 870 (1982) wherein it is stated:

... cases dealing with jurisdictional issues invariably apply the same due process to citizens and non-citizens alike. (citations omitted).

In any event, since Bunnan Tong has in fact been afforded the same due process considerations afforded to U.S. citizens under the stream-of-commerce doctrine, the question is not relevant to the instant case. Bunnan Tong's collateral question concerning the effect on jurisdiction where co-equal sovereigns are involved is without merit because there is no contention that Bunnan Tong and Company, Ltd. is wholly or partially owned by a sovereign state.<sup>3</sup>

The last question raised by the Petitioner focuses on their underlying contention that the Seventh Circuit misapplied a rule of law propounded by the United States Supreme Court in *World-Wide Volkswagen Corp.* They concede that Bunnan Tong's conduct may subject it to liability in tort but claim that, since Bunnan Tong did not actively participate in Woolworth's distribution network

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<sup>3</sup> In *Kramer and Insurance Company of North America*, the Court duly considered the impact of co-equal sovereignty on personal jurisdiction insofar as British Leyland, Ltd. was 95% owned by the British government and the Marina Salina Cruz was 100% owned by the Mexican government.

or have any direct contacts with the United States, it cannot be subject personally to jurisdiction in Wisconsin.

Through the discussions in *World-Wide Volkswagen Corp., Gray, and Oswalt*, it is clear that under existing law the control or participation in a distribution network constitutes the type of affiliating circumstance that is jurisdictionally significant. It is equally clear, however, that the lack of participation in a distribution network is not jurisdictionally fatal where the defendant introduces his products into a stream-of-commerce with the expectation that those products will be purchased by consumers in the forum state. *World-Wide*, 444 U.S. at 298.

Bunnan Tong had knowledge and expectation that their products would be purchased and were being purchased in all fifty states of the United States. They do not deny their knowledge and expectation that the flannel shirt in question, along with many others, would be purchased at a retail level by American consumers in every state where Woolworth marketed. The constitutionally cognizant contacts are the shirts in question, several of them, that were sold by Woolworth at their store in Rice Lake, Wisconsin. The affiliating circumstances are Bunnan Tong's conduct, knowledge and expectation with regard to Woolworth's market and the path these shirts would travel. The facts of the instant case do fit like a glove, irrespective of control over the distribution network, under the rules concerning indirect service of a market and expectations of purchase that were set forth in *World-Wide Volkswagen Corp.*, 444 U.S. at 297, 298. There is no substantial question of federal law and the opinion of the Seventh Circuit is in accord with the opinion of the United States Supreme Court in *World-Wide Volkswagen Corp.* The issue has been settled.

**CONCLUSION**

The Petitioner has failed to demonstrate either a conflict among federal courts of appeals on the same matter or the existence of an important question of federal law which has not been but should be settled by the Court. Accordingly, it is requested that their Petition for the issuance of a writ of certiorari be denied.

*Respectfully submitted,*

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Travelers Insurance Company

## **APPENDIX OF RESPONDENTS**

## BUYING AGREEMENT

[*Woolworth letterhead omitted*]

July 1, 1976

Bunnan Tong & Company Ltd.  
Room 902, Tong Yang Building  
112-5 Sokong-Dong, Chung-ku,  
P.O. Box 5647  
Seoul, Korea

## FACTORY 1019 BUYING AGREEMENT

Gentlemen,

This letter will confirm the arrangements between us, pursuant to which you will act as a special Buying Representative for us in the country, countries, or portions thereof, described in Item-1 of the attached Schedule "A" (hereinafter called the Territory.) The terms and conditions covering the relationship between you and us are set forth below.

1. You shall perform for us the following services:

- a) You will actively investigate buying possibilities which might be of interest to this Company in the Territory both on your own initiative, and as requested by us.
- b) You will purchase in the Territory, and forward to us, samples of merchandise as requested in writing by us. We will reimburse you for the price to you of such samples (and related shipping costs): provided that you shall invoice us for all such amounts at the time of shipment. If you forward samples to us which have not been requested by us, you will assume all costs and expenses arising out of, or related

to, such samples. In connection with samples requested by us, or otherwise provided, you will forward a Price List in the form shown in instructions furnished by our Traffic Department. All amounts shown on said Price List shall be in United States dollars.

c) Contracts of this Company for the purchase of merchandise in the Territory will be placed by you directly with the manufacturer. (Wherever the word "manufacturer" is used herein it shall be taken to mean the seller of merchandise, and also means to include the Buying Representative as our agent.)

d) All merchandise purchased by us shall first be inspected and approved by you — before being shipped to us. You agree that your approval will be granted only if such merchandise, (i) conforms to our specifications, as set forth in the applicable contract (and all amendments thereto) and is not defective in any respect, (ii) meets the requirements of all U.S. Government laws and regulations, (iii) is packaged, labeled, and invoiced, in accordance with the instructions set forth in the applicable contract, (iv) is packaged in a manner which will insure its safe transportation to this Company's stores or warehouses.

e) Prepare and forward invoices covering each shipment of merchandise, said invoices to be in the form shown in instructions furnished by our Traffic Department, — and all amounts shown on said invoices shall be in United States dollars.

f) In the case of claims of this Company against manufacturers resulting from defective, or otherwise unacceptable, merchandise, (including, but without



limitation — defects discovered after receipt, and re-sale, by F. W. Woolworth Co.) — you will act as this Company's representative in endeavoring to obtain reimbursement from the manufacturer for the defective merchandise, and will arrange to have the full amount, of such reimbursement, promptly forwarded to us.

g) You agree to stand behind all of the merchandise which you have furnished to us, which you are now furnishing to us, or which you may furnish to us — at any future date — and you agree that you will hold us harmless in regard to any claims, which may be made against us — by anyone involving this merchandise, or its sale by us, except for any claims arising from fault or negligence on our part.

h) In the event that we send to you — Labels and Tags, for use by a manufacturer, it is understood that you will pay us for such labels and tags — and rebill the same to the manufacturer. If, for any reason, you do not receive payment from any manufacturer for such labels and tags — we will reimburse you for any loss.

i) You agree that you will work to the extent possible, with reputable manufacturers (with sound credit ratings) — and who are capable of meeting the terms of our contracts. If we shall so request, you agree to supply us with credit reports, and other information, concerning manufacturers located in the Territory.

2. In consideration of the performance by you of services as our Buying Representative in the Territory, including, but without limitation, the services set forth in



Paragraph-1 above, we agree to pay you (unless a lesser Commission shall be agreed upon by you and us, with respect to any specific transaction or transactions) the percentage set forth . . . . . in Item-2 of the attached Schedule "A" of the purchase price of merchandise purchased by us during the term hereof in the Territory — such purchase price being the F.O.B. Price, provided that, if a different rate of Commission is stated in our purchase contract, such different rate shall apply with respect to such contract. The amounts specified in this Paragraph-2 shall represent your entire compensation hereunder, and you shall not be entitled to any other further compensation, payment, or reimbursement (unless otherwise specified in Item-3 of the attached schedule.) — except that you shall receive reimbursement for the cost to you of samples (and related shipping costs) as provided in Paragraph-1(b) hereof. It is understood that all consideration provided for hereunder will become payable only when the merchandise has been properly delivered on board to a carrier, for shipment to us.

3. It is understood, and agreed, that you are acting solely in the capacity of independent contractor. No contract for the purchase of merchandise by this Company shall become effective unless approved in writing by us, it being understood that you are not authorized to enter into any agreement, or commitment, on our behalf — without receiving, in each case, our prior written approval. No verbal authorizations shall be effective unless confirmed by cable, or other writing, by us. You agree that you will not characterize yourselves, in any way, other than as "special Buying Representative in (here insert name of Territory) of F. W. Woolworth Co."

4. The purchase price of all merchandise contracted for by us will be stated in United States dollars. Our sole

responsibility shall be to pay for such merchandise, following its proper delivery on board to a carrier, the amount in United States dollars — set forth in our contract, and all arrangements made by you with manufacturers, will be on the basis that the risk of fluctuations in exchange rates will be borne by the manufacturer (whether or not specific provision therefor is set forth in our contract), it being understood that you will bear all losses to us resulting from failure by you to make arrangements on such basis. Similarly, all payments to you by us will be made in United States dollars computed on the basis of purchase price in United States dollars set forth in the respective contracts. Such payments will be made by Letters of Credit, or such other means, as we may select.

5. The Company assumes no obligations for merchandise not delivered on board to a carrier, as required in Paragraphs-2 and -4 hereof, unless such obligations are specifically assumed by us in writing, including, but not limited, to such obligations as purchase of raw material for conversion into finished articles, assembly, packaging and inspection.

6. Additional or special provisions, if any, relating to the relationship between us, are set forth in Item-3 of the attached Schedule "A" which provisions are hereby incorporated herein by reference.

7. It is understood, and agreed, that the relationship herein provided for is not exclusive — and that this Company shall have the right to enter into arrangements with other special Buying Representatives, or manufacturers in the Territory, without obligation to you.

8. This agreement may be terminated by either party, by giving at least 60-days prior written notice of the effective date of such termination, to the other party.

9. Upon termination of this agreement, (a) all rights and obligations of the parties hereto shall cease and terminate, except as to rights and obligations accrued prior to the date of such termination, (b) we shall have the right to deal with all manufacturers, either directly, or through one or more other special Buying Representatives, without further obligations to you, and (c) you shall turn over to us — any and all copies of contracts and other information in your files, relating to our arrangements with manufacturers (it being understood that all such contracts and other information shall be treated by you as confidential, and shall not be disclosed by you to any third party, either during or after the term hereof.)

10. This Agreement shall be the only agreement between our Company and you. Any previous agreements between us are hereby cancelled, and made null and void.

If the foregoing terms and conditions are satisfactory to you, please sign and return to us — original copy of this letter, and retain the enclosed duplicate copy for your files, whereupon this letter shall constitute a binding agreement between us, effective as of the date of this letter.

Very truly yours  
F. W. WOOLWORTH CO.  
/s/ C. L. Rhodes

---

C. L. RHODES  
Director of Import Buying &  
Sales

Agreed to:

/s/ T. K. Tong

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By T. K. TONG, MANAGING DIRECTOR  
BUNNAN TONG & CO. LTD.

Date 18 June, 1976.

EXCERPTS FROM DEPOSITION OF  
SHERRY NELSON CONDUCTED ON  
JULY 7, 1982

Sherry Nelson, having been first duly sworn, testified as follows:

*(Adversely examined by Mr. Crivello)*

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Q. Can you tell me how long Telinda had had this shirt before this incident occurred? A. It was bought in December and she received it for Christmas so by the time the accident happened it would have been about ten months.

Q. I have indicated that it was purchased on December 4 of '77? A. I'm not sure about the date, but it was the first weekend of December.

\* \* \*

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Q. Did you know when you went into Woolworth's what you were going to buy? A. No.

Q. What made you decide, if anything, other than possible need to get a shirt for Teli? A. We saw them there. They had a sale on them and it was a good buy and we decided because we camp a lot and because the evenings are chilly and so forth we decided to buy flannel shirts.

Q. And they were on sale? A. Yes.

Q. Did you first become aware of that when you got into the store and you saw this counter sale and you went over there? A. Yes.

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Q. And you go camping a lot so a heavier shirt would be good for Teli? A. Right.

Q. Okay. Can you tell me where this counter was located in relation to any entrances to that store? A. It would have been close to the mall entrance in the children's section.

\* \* \*

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Q. The Woolworth's store carries many different items, is that correct? A. Correct.

Q. Can you tell me how large that counter was? A. No, I can't.

Q. When you say it was a counter, was it a display counter, was it a display window? What type of counter was it? A. What do you mean by display counter?

Q. Were a number of shirts or a number of items on the counter

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or was this the only one on there or were there just a couple of them on there? A. There were several on the counter on the top.

Q. Several shirts? A. Yes.

Q. Was there any other item other than this type of shirt on that counter? A. No.

Q. Were there any signs on the counter? A. Only a sale sign.

\* \* \*

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Q. Okay. How many shirts did you buy that day from that particular counter? A. I bought two.

Q. And for whom? A. I bought one for Staci and one for Teli.

Q. All right. Do you know if the shirt you bought that day for Staci was the one she had on on the date or if she had that one on on the date this incident occurred? A. I don't recall what shirt she had on that day.

Q. Were these shirts in packages or were they folded not in

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packages? What was the situation? A. They were folded in a cellophane package of some sort.

Q. Could you see obviously through the cellophane? A. Yes.

Q. Okay. Did the cellophane have any printing on it? A. Yes, it did.

Q. What did it say? A. I don't recall exactly.

Q. Do you recall whether the printing was large or small? What can you tell me about the printing? A. All I can recall is that it was written at an angle. It was in a print and it was white.

Q. The package was cellophane? A. Yes.

Q. There was printing on it as opposed to writing on it? A. Yes.

Q. And the printing was in white? A. Yes.

Q. Anything else — strike that. You say it was on a diagonal? A. Yes.

Q. How do you know that that is the shirt that Teli had on on the date of this incident? A. Because of the accident I remember it.

Q. Anything else that leads you to the conclusion that the shirt Teli had had on on the date of this occurrence

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was the one you purchased in the first week of December, '77? A. Yes. My girlfriend was there and bought shirts of the same type.

\* \* \*

Q. Do you recall what size shirt you bought that day or what

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size shirts? You say you bought two of them. What sizes were those shirts? A. I bought a size 8 and a size 10.

Q. Did you give that shirt to Teli for Christmas? A. Yes, I did.

\* \* \*

Q. What do you remember about looking for sizes? A. Just that I found the size that would fit them the closest. Eventually they would grow into them so I went ahead and bought them anyway.

Q. What sizes — or strike that. Was the size 10 that you purchased off of this same counter? A. Yes.

Q. So the 8 and 10 were both there?

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A. Yes.

Q. Were there any other sizes on that counter? A. I remember they went up to size 14.

\* \* \*

Q. How many labels, if more than one, were you able to visualize when you were shopping for this shirt?

A. Only one.

Q. Would that be the tag on the back of the neck?

A. Yes.



Q. How large was that tag? A. I don't know.

\* \* \*

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Q. Do you remember anything else about that label that was either written on it that you saw that you remember now? A. I remember the name "Tops All" or "Top All" printed on it.

Q. Do you know what color that was in? A. No, I don't.

Q. Were the labels on the size 8 and the size 10 identical except for size designations? A. As far as I can remember they were.

\* \* \*

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Q. Did your girlfriend, did you say she bought some shirts off the same counter? A. Yes.

Q. Do you recall how many she purchased?

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A. She bought four.

Q. Do you recall what sizes they were? A. No, I don't.

Q. Were they for her children? A. For her son.

\* \* \*

Q. When you opened the shirt at Christmas time, were you able to determine if there were any other labels other than this

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one that you recall and have told us about? Were there any other labels in the shirt anyplace? A. Not that I recall.

Q. None at all? A. Not that I recall.

Q. Okay. How about a laundering tag? A. It's possible, but I don't remember.

Q. You just don't remember any others than this one? A. I don't.

Q. Is that correct? A. Correct.

Q. Did Teli wear this shirt from the Christmas time throughout the winter season? A. Yes.

Q. Can you tell me approximately how many times she wore that shirt before this incident occurred? A. I can't tell you. They just wore it whenever the weather needed it, warranted it.

Q. The weather through — A. Through the winter-time.

\* \* \*

### AFFIDAVIT OF NAI YAN CHAN

*[Venue and caption omitted]*

I, Nai Yan Chan, being first sworn on oath, depose and state as follows: —

- (1) That I have been a Director of Bunnan Tong and Company Limited of Hong Kong (hereinafter called "the Company") since 1974 and I was a director of the Company on or about October 28, 1978 and still am a director of the Company.
- (2) That I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.
- (3) That the Company is duly incorporated under the laws of Hong Kong and is an exporter and agent for foreign buyers of general merchandise

including but not limited to textile products manufactured in Hong Kong and other South East Asian countries.

- (4) That the Company has never been licensed to do business in the State of Wisconsin.
- (5) That the Company does not own any real or personal property within the State of Wisconsin.
- (6) That the Company does not employ any individuals within the State of Wisconsin.
- (7) That the Company does not maintain any office in the State of Wisconsin
- (8) That the Company has never had any agents, sales persons, distributors or advertised in the State of Wisconsin.
- (9) That the Company has never made any business calls to any contacts in the State of Wisconsin.
- (10) That the Company has never had any advertising done on its behalf in the State of Wisconsin to solicit business.
- (11) That F. W. Woolworth Company is not nor has it ever been the Company's agent or representative in the State of Wisconsin.
- (12) That the Company has never serviced any of its products in the State of Wisconsin.
- (13) That the Company acted as the buying representative of F. W. Woolworth Company in Hong Kong whose staff came to Hong Kong to place orders for shirts carrying label "TOPSALL" (hereinafter called "the said goods") with the Company in early 1976. The Company then pur-

chased the said goods on behalf of F. W. Woolworth Company at an agreed commission from United Garment Manufacturing Company Limited of 1151-1153 Canton Road, First Floor, Hong Kong, F.O.B. Hong Kong.

- (14) That the said goods were delivered by the Company to WESTERN NAVIGATION (FAR EAST) LIMITED, formerly of Nos. 15-19, Ha Heung Road, 6th floor, To Kwa Wan, Kowloon presently of Rooms 712-715, world Commerce Centre, 11 Canton Road, Tsimshatsui, Kowloon, forwarders in Hong Kong nominated by F. W. Woolworth Company, who in turn on the instructions of F. W. Woolworth Company arranged to have the said goods shipped to New York, Boston, Philadelphia, San Francisco and Los Angeles. None of the said goods were shipped directly to anywhere in the State of Wisconsin.
- (15) That the Company has not done anything with the goods in question to prepare them for sale.
- (16) That physical control and custody of the said goods passed to F. W. Woolworth Company once the said goods were delivered over the rail of the vessel sailing to the United States.
- (17) That F. W. Woolworth Company paid for the insurance and the cost of shipping the said goods from Hong Kong to their destinations in the United States.
- (18) That the Company has never received any direct benefit or protection as a result of laws of the State of Wisconsin in the course of its business.
- (19) That the Company has never been involved in a suit in the State of Wisconsin, either as a plain-

tiff or a defendant, or submitted to the jurisdiction of the Wisconsin Courts.

(20) That there was no service of summons upon the Company within the State of Wisconsin.

(21) That the Company received the Summons and Complaint in Hong Kong.

/s/ Nai Yan Chan

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Nai Yan Chan

Subscribed and sworn to before me this  
17th day of August, 1982.

/s/ Kenneth Lo

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Notary Public, Hong Kong

KENNETH LO  
Notary Public  
Hong Kong

## AFFIDAVIT OF PETER CHOI

*[Venue and caption omitted]*

I, Peter Choi, being first duly sworn, depose and state as follows:

1. I have been a director of United Garment Manufacturing Company, Ltd., of Hong Kong (hereinafter "the Company") since 1976; that I was a director of the Company on or about October 28, 1978; and that I currently am one of three directors of the company.

2. I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.

3. The Company was organized as a limited liability company in Hong Kong in 1957 and is presently duly incorporated under the laws of Hong Kong. The Company manufactures textile products in Hong Kong.

4. The Company is not now licensed and has never been licensed to do business in the state of Wisconsin, or elsewhere in the United States.

5. The Company does not now own and has never owned any real or personal property within the state of Wisconsin or elsewhere in the United States.

6. The Company does not now employ and has never employed any individuals within the state of Wisconsin or elsewhere in the United States.

7. The Company does not now maintain and has never maintained any office in the state of Wisconsin or elsewhere in the United States.

8. The Company has never had any agents, representatives, employees, sales persons or distributors in the state of Wisconsin or elsewhere in the United States.

9. Neither the Company nor any representative of the Company has ever made any business trips or calls to anyone in the state of Wisconsin or elsewhere in the United States.

10. The Company has never had any advertising done on its behalf to solicit business in the state of Wisconsin or elsewhere in the United States.

11. Neither F. W. Woolworth Company nor Bunnan Tong and Company, Ltd. ("Bunnan Tong") are now nor ever have been the Company's agent or representative in the state of Wisconsin or elsewhere in the United States.

12. The Company has never serviced any products in the state of Wisconsin or elsewhere in the United States.

13. The Company sold certain "Topsall" shirts to Bunnan Tong in Hong Kong with deliveries to Bunnan Tong in Hong Kong in early 1977. Other than these deliveries, the Company never sold "Topsall" shirts.

14. Thereafter, the Company had nothing further to do with or further interest in the "Topsall" shirts sold to Bunnan Tong.

15. The Company has never received any direct benefit or protection as a result of the laws of the state of Wisconsin in the course of its business.

16. The Company has never been involved in a suit in the state of Wisconsin, either as a plaintiff or a defendant, or submitted to the jurisdiction of the Wisconsin courts.

17. There was no service of summons upon the Company within the state of Wisconsin.

18. The Company received the summons and complaint in this action in Hong Kong.

DATED: November 12, 1982

/s/ Choi

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Peter Choi For Wing

Consulate General of the )  
United States of America) SS:  
at Hong Kong )

Subscribed and sworn to before me  
this 12th day of November, 1982.

/s/ Barbara Tobias

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Barbara Tobias  
*American Consul*



AFFIDAVIT OF CHARLES W. TURNER  
(Turner Affidavit I)

*[Venue and caption omitted]*

STATE OF NEW YORK :  
: SS.  
COUNTY OF NEW YORK:

CHARLES W. TURNER, being first duly sworn,  
states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. F. W. Woolworth Company of the United States has dealt regularly and extensively with Bunnan Tong & Company, Ltd., as a broker and importer of men's shirts and other merchandise, since the end of World War II; In addition to dealing with F. W. Woolworth Company of the United States, Bunnan Tong & Company, Ltd.,

has also, since the end of World War II, engaged in extensive business dealings, on a similar basis, with F. W. Woolworth Company of Canada, United Kingdom and West Germany.

4. In your affiant's personal dealings and meetings with T. K. Tong over the years, Mr. Tong has expressed and indicated detailed familiarity with the scope and extent of F. W. Woolworth Company's operations on an international scale.

5. During the late 1960's and early 1970's, before your affiant made yearly trips to Bunnan Tong & Company, Ltd., in Hong Kong, both T. K. Tong and Nai Yan Chan made periodic business visits to the corporate offices of F. W. Woolworth Company in New York City.

6. Both T. K. Tong and Nai Yan Chan, during the years I dealt personally with them, were fully aware that F. W. Woolworth Company retailed the shirts purchased via Bunnan Tong & Company, Ltd., throughout the United States.

/s/ Charles W. Turner

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CHARLES W. TURNER

Subscribed and sworn to before me  
this 6 day of December, 1982.

/s/ Lillian M. Schultz

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Notary Public, State of New York

My Commission : 3/30/83

LILLIAN M. SCHULTZ  
Notary Public, State of New York  
No. 0632300  
Qualified in Kings County  
Commission Expires March 30, 1983

AFFIDAVIT OF CHARLES W. TURNER  
(Turner Affidavit II)

*[Venue and caption omitted]*

STATE OF NEW YORK :  
: SS.  
COUNTY OF NEW YORK:

CHARLES W. TURNER, being first duly sworn,  
states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. For a period of approximately four to five years, from 1973 through 1977, United Garment Manufacturing Company, Ltd., hereinafter referred to as United Garment, was the exclusive manufacturer of all 100% cotton flannel boy's shirts purchased by F. W. Wool-

worth Company of the United States, through their broker and importer, Bunnan Tong & Company, Ltd.,

4. During said four to five year period, your affiant visited the premises of United Garment in Hong Kong at least once each year, and on these visits, had personal dealings with the owner of the company, and primarily with one of the directors of the company, Peter Choy For Wing

5. United Garment manufactured boy's 100% cotton flannel shirts specifically for Woolworths, during said years, under the Topsall label; Topsall was Woolworth's label during said years, and United Garment had full knowledge of this fact, and actually, manufactured the Topsall label on Woolworth shirts for Woolworth.

6. Peter Choy For Wing was fully aware that the shirts United Garment manufactured under the Topsall label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.

7. During said years when United Garment manufactured shirts under the Topsall label for Woolworth, United Garment also manufactured shirts under labels for other American distributors and retailers, including specifically, Men's Wear International, a division of Van Heusen, and Montgomery Ward.

8. Because of the nature of the labor market in the textile industry, for at least the last 10 years, 85% to 90%

of all cotton flannel shirts sold in the United States have been manufactured outside of the United States.

/s/ Charles W. Turner

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CHARLES W. TURNER

Subscribed and sworn to before me  
this 6 day of December, 1982.

/s/ Lillian M. Schultz

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Notary Public, State of New York

My Commission: 3/30/83

LILLIAN M. SCHULTZ  
Notary Public, State of New York  
No. 0632300  
Qualified in Kings County  
Commission Expires March 30, 1983